SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 52

MAKAH INDIAN TRIBE,
as a tribe and as a Federal corporation,
on its own behalf and on behalf of each of its members,
Appellants,

v.

TAX COMMISSION OF THE STATE OF WASHINGTON; GEORGE KINNEAR, Tax Commissioner and Chairman of the Tax Commission of the State of Washington, and JANE DOE KINNEAR, his wife; G. MERTON DICK, Tax Commissioner of the State of Washington, and JANE DOE DICK, his wife; CLARK SQUIRE, Tax Commissioner of the State of Washington, and JANE DOE SQUIRE, his wife, *Appellees,*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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THE ARGUS PRESS SEATTLE, WASHINGTON

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ON APPEAL FROM THE SUPREME COURT OF
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JURISDICTIONAL STATEMENT

This case involves the constitutionality of a state regulation taxing merchandise earmarked for sale in Indian commerce. In this sense, the case is the sequel to *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965). Specifically this case involves the constitutionality of the Washington State Cigarette Tax as applied to cigarettes sold in Indian commerce on the Makah Indian Reservation in the State of Washington.

Appellant, The Makah Indian Tribe, appeals to the Supreme Court of the United States from the judgment

of the Washington Supreme Court issued January 2, 1968. (Appendix C) The Makah Indian Tribe submits this statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at 72 W.2d 608, 434 P.2d 580 (1967), and is reprinted as Appendix A. The Superior Court's decision is not reported but is reprinted as Appendix B. The judgment appealed from (being the Remittitur) is reprinted as Appendix C.

JURISDICTION

On September 9, 1965, the Makah Indian Tribe filed a Complaint in the Superior Court of the State of Washington for Thurston County, seeking a declaratory judgment pursuant to Revised Code of Washington, Chapter 7.24 (the Uniform Declaratory Judgments Act), and a permanent injunction pursuant to Revised Code of Washington, Chapter 7.40.

The action resulted from the Washington State Tax Commission Letter Regulation of July 20, 1965, imposing the Washington Cigarette Tax, established in Revised Code of Washington §§ 82.24.020, 73. 32. 130 and 28.47.-440, upon all cigarettes sold at retail to Indians on reservations in the State of Washington.

The action was brought in order to secure a declaration that the Washington Cigarette Tax as applied is invalid as a violation of Article I, Section 8, Clause 3 of the Constitution of the United States and 25 U.S.C. §261.

On September 9, 1965, at the time of filing of its Com-

int (R.3), the Makah Indian Tribe obtained a Re-
ining Order and Order to Show Cause (R.10) which
rained the Tax Commission from levying taxes on
arettes sold at retail to the Makah Indian Tribe or any
its members on the Reservation and required the Tax
nmission to notify wholesalers of such cigarettes that
y would not be taxed and need not bear cigarette tax
mps until further notification. The Order to Show
ıse required the Tax Commission to appear and show
se on September 20, 1965, why the Restraining Order
uld not be made permanent.

On September 15, 1965, the Superior Court entered an
ler Revising Act of Court Commissioner (R.18) which
vided that the restraint and notice requirements of the
lier Order be vacated.

On October 4, 1965, hearing was held upon the earlier
ler and on October 5, 1965, the Superior Court en-
ed a Memorandum Opinion (R.24) denying the Makah
ian Tribe's application for a temporary injunction to
tinue the provisions of the Restraining Order until the
e of trial.

On October 27, 1965, the Superior Court tried the mat-
and rendered an oral decision (Appendix B) adverse
the Makah Indian Tribe.

On December 13, 1965, the Makah Indian Tribe filed a
ely Notice of Appeal. (R.100)

On November 30, 1967, the Washington Supreme Court
med the Superior Court and rendered a written
nion. (Appendix A)

On January 2, 1968, the Washington Supreme Court
ed its Remittitur to the Superior Court containing the

Judgment enforcing the written opinion of the Washington Supreme Court entered November 30, 1967. Revised Code of Washington §2.04.170, Supreme Court Administrative Rule 15.

On February 21, 1968, the Makah Indian Tribe filed, in the Washington Supreme Court, a Notice of Appeal from the Remittitur to the Supreme Court of the United States.

The jurisdiction of the Supreme Court to review this Judgment by appeal is conferred by 28 U.S.C. § 1257 (2) which reads in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

"Statute of any state" as used in the quoted statute has been held by the Supreme Court to include legislative orders of bureaus of state government given constitutional or statutory sanction, as in this case. *Hamilton v. Regents of the University of California* 293 U.S. 245, 258 (1934); *Sultan Ry. & Timber Co. v. Department of Labor and Industries of State of Washington* 277 U.S. 135, 136 (1928); *Live Oak Water Users' Ass'n v. Railroad Commission of State of California* 269 U.S. 354, 356 (1926).

The following decisions further sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685, 686 (1965); *Central*

. *Co. of Pennsylvania v. Pennsylvania,* 370 U.S. 607, 608 1962); *Memphis Steam Laundry Cleaner v. Stone,* 342 .S. 389 (1952); *Eureka Pipe Line Co. v. Hallanan,* 257 .S. 265, 269, 270, 271 (1921); *Dahnke-Walker Milling o. v. Bondurant,* 257 U.S. 282, 288, 289 (1921); *Mer-hants' Nat. Bank v. Richmond,* 256, U.S. 635, 637 1921).

STATUTES AND REGULATIONS INVOLVED

Article I, Section 8, Clause 3 of the United States Con-itution, found at United States Code, Constitution, page 9, provides in part:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

The following provision of the United States Code is aterial:

19 Stat. 200 (1876), 25 U.S.C. § 261, found at United tates Code, Title 25, page 189, provides:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

The following provisions of the Revised Code of Wash-ngton establish the Washington Cigarette Tax:

Revised Code of Washington §82.24.020, found at aws, Extraordinary Session, 1965, ch. 173, § 23, page 764, provides:

> "There is levied and there shall be collected as

hereinafter provided, a tax upon the sale, use, consumption, handling or distribution of all cigarettes, in an amount equal to the rate of four mills per cigarette."

Revised Code of Washington §73.32.130, found at Laws, 1959, ch. 272, § 2, page 1275, provides in part:

> "In addition thereto, there is hereby levied and there shall be collected by the tax commission from the persons mentioned in and in the manner provided by chapter 82.24, as now or hereafter amended, an excise tax upon the sale, use, consumption, handling or distribution of cigarettes in an amount equal to the rate of one mill per cigarette . . ."

Revised Code of Washington §28.47.440, found at Laws, Extraordinary Session 1955, ch. 3, §5, page 1723. provides in part:

> "In addition to the taxes levied by RCW 73.32.130 and 82.24.020, there is levied and shall be collected by the tax commission from the persons mentioned in and in the manner provided by chapter 82.24, as now or hereafter amended, an excise tax upon the sale, use, consumption, handling or distribution of cigarettes in an amount equal to the rate of one-half mill per cigarette . . ."

The Washington State Tax Commission Letter Regulation of July 20, 1965 provides:

> "To: "Date: July 20, 1965
>
> "Subject: Cigarette Tax on Sales to Indians
>
> "The Tax Commission has recently learned of several instances in which Indians conducting businesses upon Indian Reservations are selling cigarettes to which the State of Washington Cigarette Stamps have not been affixed. There is evidence that such unstamped cigarettes are being sold to both Indians and non-Indians.

"You are hereby informed that the sale, handling or distribution of cigarettes by Washington distributors to Indians, including sales for resale on an Indian Reservation, are subject to the Cigarette Tax of 11 cents per package. Distributors and wholesalers of cigarettes will be liable for purchasing and affixing the required stamps upon all cigarettes so sold, and upon failure to do so will become liable for the penalties provided in RCW 82.24.110, 120 and 130.

"In support of this ruling, your attention is directed to RCW 82.24.080: 'It is the intent and purpose of this Chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, *handled, or distributed within this state and to collect the tax from the person who first* sells, uses, consumes, *handles or distributes them in the state.*' (underscoring supplied)

"This ruling does not affect the exemption allowed in respect to sales made directly to U.S. Government departments or agencies nor in respect to sales made in interstate or foreign commerce.

"Since this matter has not been ruled on previously by the Tax Commission, the tax will be applicable prospectively from the date of this bulletin and will not apply in respect to any prior transactions."

TAX COMMISSION OF THE STATE OF WASHINGTON (R.94)

Related statutes and regulations involved in this appeal are as follows:

31 Stat. 1066 (1901), 32 Stat. 1009 (1903), R. S. § 2132, 22 Stat. 179, (1882), 25 U.S.C. §§262-264.

22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958)

Laws, 1961, ch. 15 §82.24.010 – 120, pp. 969-973, §82.24.220, p. 977, §82.24.900, p. 977, §82. 32.300, p. 997. Revised Code of Washington §§82.24.010 – 120, .220, 900; §82.32.300.

All of the foregoing are printed in full as Appendix D.

QUESTION PRESENTED

The Washington Supreme Court has construed Revised Code of Washington, §§82.24.020, 73.32.130 and 28.47.-440 and the Washington State Tax Commission Letter Regulation of July 20, 1965, as imposing the Washington Cigarette Tax upon cigarettes sold at retail to Indians on reservations in the State of Washington.

The basic question presented is:

> Whether Revised Code of Washington, §§82.24.-020, 73.32.130 and 28.47.440 and the Washington State Tax Commission Letter Regulation of July 20, 1965, as applied, are invalid as being repugnant to and in violation of that portion of Article 1, Section 8, Clause 3 of the United States Constitution which states: "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes;" and 25 U.S.C. §261.

STATEMENT OF THE CASE

Washington has had a cigarette tax since 1935. For thirty years, from the time of its enactment until 1965, the Washington Cigarette Tax was not imposed upon cigarettes sold at retail to Indians on reservations in the state of Washington. (Appendix A-4)

The Makah Indian Tribe comprises approximately 700 enrolled Makah Indians who reside on the Makah Indian Reservation in the state of Washington. The tribe is a federal corporation, organized under the Indian Reorganization Act of 1934. Members of the tribe who smoke are served by nine retailers on the Reservation who sell cig-

arettes by the package or carton to the general public. Ownership of the retail outlets is part Indian, part non-Indian. (Ex. Stipulation of Facts, R.92)

Throughout the years, the Washington Cigarette Tax has been increased through legislative amendment. In early 1965, the tax was raised from seven cents per package to eleven cents per package, effective June 1, 1965. Thereafter, Indians on the Colville Reservation in the state of Washington, set up a roadside stand, advertising and selling tax-free cigarettes at retail to all purchasers, both Indian and non-Indian. Following vehement and adverse newspaper publicity, the Washington State Tax Commission issued its Letter Regulation of July 20, 1965, instructing all cigarette wholesalers in the State of Washington to affix cigarette tax stamps in the amount of eleven cents per package to all cigarettes sold, handled or distributed to Indians for resale on Indian reservations in the state of Washington. (Ex. Stipulation of Facts, R.95)

Wholesalers selling cigarettes to retailers on the Makah Indian Reservation received the Letter Regulation and thenceforth supplied the retailers only with cigarettes to which cigarette tax stamps had been affixed, collecting from each retailer the exact amount of the tax represented by the stamps, viz., eleven cents per package. The retailer in turn collected the eleven cents per package from each cigarette purchaser on the Makah Indian Reservation, whether Indian or non-Indian. (Ex. Stipulation of Facts, R.95)

During the entire period from 1935 through 1965, the Commissioner of Indian Affairs was vested with sole power and authority to license and appoint traders to the Indian Tribes and to make rules and regulations gov-

erning their activities, including specifying the kind and quantity of goods they might sell and the prices at which such goods could be sold to the Indians. 25 U.S.C. §§261-264. Pursuant to his authority, the Commissioner of Indian Affairs prescribed detailed rules and regulations governing Indian traders. 25 C.F.R. §251

On September 9, 1965, the Makah Indian Tribe brought an action for declaratory judgment and permanent injunction in the Superior Court of the State of Washington for Thurston County. Upon trial of the matter, the Superior Court held against the Makah Indian Tribe, basing its opinion upon the following reasoning:

> "The Court is therefore of the opinion that the injunction will not lie in this matter. The Court will dismiss this action on the basis that this is a remote tax, it is not a direct tax upon the Indians in this matter, and is therefore not covered by the commerce clause of the United States or by any actions of Congress in relation thereto and, of course, the Court finds no violation of the State Constitution as such." (Appendix B-5)

The Makah Indian Tribe appealed to the Washington Supreme Court which affirmed the opinion of the Superior Court. The Washington Supreme Court held:

> "The trial court concluded that the tax complained of is not such a burden upon commerce with the Indian tribes as to violate article 1, section 8, clause 3 of the United States Constitution; that the incidence of the tax occurred outside of any Indian reservation and prior to the entry of the cigarettes into Indian commerce; and that its effect upon the Makah tribe, or any of its members, is 'too indirect and remote to render it unconstitutional'.
>
> "We are in accord with the findings and the conclusions of the trial court. The judgment is affirmed." (Appendix A-5).

HOW THE FEDERAL QUESTION WAS PRESENTED

The Makah Indian Tribe's Complaint:

The Makah Indian Tribe's Complaint set forth verbatim the Letter Regulation of July 20, 1965, which imposed the Washington Cigarette Tax (comprising the three taxes established by Revised Code of Washington §§82.24.020, 73.32.130 and 28.47.440) upon cigarettes sold on the Makah Indian Reservation, and alleged that it:

> "violates the Constitution of the United States and Federal Statutes and the Constitution of the State of Washington." (R.5)

The Complaint further alleged that:

> "all cigarettes presently being sold on the Makah Indian Reservation have been illegally taxed pursuant to the letter regulation...." (R.5)

and prayed that:

> "1. The court enter judgment declaring that goods and services sold to the Makah Indian Tribe or any of its members on the Makah Indian Reservation are not subject to taxation by the State of Washington or any governmental agency thereof.
>
> "2. The court issue a restraining order pending a preliminary hearing, a temporary injunction upon such hearing and a permanent injunction upon trial of this matter, each restraining and enjoining defendants and each of them from levying tax upon cigarettes sold to the Makah Indian Tribe or any of its members on the Makah Indian Reservation, Washington." (R.5)

Oral Decision of Superior Court of Washington:

The Superior Court granted judgment in favor of the

Washington State Tax Commission, upholding the validity of the Letter Regulation of July 20, 1965, by finding that imposition of the tax did not violate the Constitution of the United States or Federal statutes.

The Makah Indian Tribe's Brief to the Washington Supreme Court:

On appeal to the Washington Supreme Court, the Makah Indian Tribe, through assignments of error and argument, renewed its position that the Washington Cigarette Tax, as applied through the Letter Regulation of July 20, 1965, constituted a violation of Article I, Section 8, Clause 3 of the Constitution of the United States and 25 U.S.C. §261. In its brief, the Makah Indian Tribe's proposition of law number 3 stated specifically:

> "The Washington Cigarette Tax, as applied in the instant case, unconstitutionally regulates Indian commerce, a field pre-empted by Congress." (R.96, p. 8).

Discussion under the quoted proposition of law in the brief concluded as follows:

> "Accordingly, under the *Warren* rule the tax constitutes a direct and precisely measurable financial burden upon Indian commerce in violation of Article I, Sec. 8, of the Constitution of the United States, and 25 U.S.C. Sec. 261." (R. 96, p.10).

THE FEDERAL QUESTION IS SUBSTANTIAL

The question presented is whether a state can tax merchandise specifically earmarked for Indian commerce, by requiring that the tax be paid prior to the arrival of the merchandise within the boundary of the Reservation. Such state action is in direct violation of Article I, Section 8, Clause 3 of the Constitution of the United States, 25

U.S.C. §261 and the holding of the Supreme Court in *Warren Trading Post Company v. The Arizona State Tax Commission,* 380 U.S. 685 (1965).

The Washington Cigarette Tax, as extended to Indian commerce by the State Tax Commission's 1965 regulation, achieves the purpose of state taxation of Indian commerce while purporting to be a tax on off-reservation merchandise. This is made clear by the sequence of events leading to the imposition of the tax on July 20, 1965.

First, the Washington State Legislature raised the tax from seven cents to eleven cents per package effective June 1, 1965, and thus made it profitable for non-Indians to purchase untaxed cigarettes on Washington Indian reservations. Then Indians on the Colville Indian Reservation, in the State of Washington, set up a roadside stand, advertising and selling untaxed cigarettes at retail to all purchasers, both Indian and non-Indian. Finally, the Washington State Tax Commission, faced with the seemingly insurmountable problem of enforcing payment of the tax by non-Indians purchasing cigarettes on the Colville Indian Reservation, seized upon the wording of Revised Code of Washington §82.24.080, making the Washington Cigarette Tax incident not only to cigarettes "sold, used," or "consumed" in the state, but also to those "handled or distributed" in the state. The broad language of the statute promised not only a method of enforcing collection of the tax from non-Indians but more importantly a method of avoiding federal pre-emption of Indian commerce and enforcing collection of the tax from all Indians on reservations in the State of Washington.

The thinking of the Washington State Tax Commission is apparent from the first paragraph of the Letter Regulation of July 20, 1965, which states:

> "The Tax Commission has recently learned of several instances in which Indians conducting businesses upon Indian Reservations are selling cigarettes to which the State of Washington Cigarette Stamps have not been affixed. There is evidence that such unstamped cigarettes are being sold to both Indians and non-Indians."

The obvious and intended consequence of the Letter Regulation was to raise the price of cigarettes to retailers on the Makah Indian Reservation and to members of the Makah Indian Tribe by eleven cents per package—the wholesaler collects eleven cents more per package from the retailer; the retailer eleven cents more from the Indian purchaser.

It is not contended by the Washington State Tax Commission that the eleven cents increase in the retail price of cigarettes on the Makah Indian Reservation was due to any economic factor other than imposition of the tax. Quite the contrary, the sole and direct cause of the price increase was the affixing of cigarette tax stamps pursuant to the Letter Regulation of July 20, 1965.

If the State of Washington may collect a tax on cigarettes sold to Indians on their reservations by collecting the tax from the wholesaler even where the cigarettes are earmarked for shipment to the reservations, then the state may accomplish all of the results which the Supreme Court held could not be accomplished in the *Warren* case, and the doctrine of federal pre-emption of Indian commerce is robbed of its effectiveness. Parenthetically, it should be noted that the sale of untaxed cigarettes by Indians to non-Indians is a problem which can be dealt with administratively by the Commissioner of Indian Affairs without legitimizing state interference with Indian commerce.

y the broad wording of Revised Code of Washington
2.24.020, 73.32.130 and 28.47.440, the Washington
arette Tax is incident to any of the following activi-
: sale, use, consumption, handling or distribution of
arettes. The tax ultimately collected from the Indian
arette consumer on the Makah Indian Reservation
d ostensibly incident to wholesale activity off the
kah Indian Reservation) is eleven cents per package,
same as the tax ultimately collected from the non-
ian cigarette consumer elsewhere in the state (and
dent to sale, use, or consumption of cigarettes).

The question must be asked, "Why cigarettes? Why not
s and butter? Why may the State of Washington not
ase its retail sales tax in the alternative, as is the Wash-
ton Cigarette Tax, make the tax incident to "sale, use,
sumption, handling or distribution" of all merchandise
the State of Washington, and thus effectively levy its
il sales tax upon all Indian commerce on Washington
lian reservations?"

Absolutely no reason, logical or legal, can be conjured
to prevent the State of Washington from doing so. If
Washington Cigarette Tax as applied in the instant
e does not constitute a burden upon Indian commerce,
State of Washington is free to burden Indian com-
rce to any extent it choose merely through the device
phrasing the appropriate statute in the alternative. This
e constitutes, then, a direct conflict between the desire
the State of Washington to tax Indian commerce and
eral pre-emption of Indian commerce.

The reasoning of the Washington Supreme Court in
; case dangerously misconstrues the extent of and
losophy underlying federal pre-emption of Indian com-
rce. Jurisdiction of the United States over Indian com-

merce is exclusive and absolute. "Indian commerce" was defined by the Supreme Court of the United States in *United States v. Holliday*, 70 U.S. 407 (1865) as follows:

> "And so commerce with the Indian tribes, means commerce with the individuals composing those tribes."

Congress' power over Indian commerce is "exclusive and absolute" and applicable to Indian commerce conducted wholly within a single state, or wholly outside an Indian reservation. *Dick v. United States*, 208 U.S. 340 (1908); *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188 (1876).

Pursuant to its constitutional authority, Congress has enacted comprehensive federal regulations over Indian commerce.

25 U.S.C. §261 provides:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

In the *Warren* case, the Supreme Court made it crystal clear that federal pre-emption of Indian commerce is predicated *only* upon a philosophy of protecting Indians. In the *Warren* opinion, Mr. Justice Black stated at p. 169:

> "We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income

would put financial burdens on appellant *or the Indians with whom it deals* in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up *in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.*" (Emphasis supplied)

If the decision appealed from is allowed to stand, not only the State of Washington but each other state of the 25 states containing Indian reservations in which 471,938 Indians reside[1], will be encouraged to burden Indian commerce with state taxes as in this case. For in the instant case, the tax impact on the Indian commerce is not at all in doubt. In the *Warren* case, the Arizona tax was not tied to any single item of merchandise but was general and merely measured by gross receipts of the retailer, whereas the Washington tax is precisely determined at eleven cents per package of cigarettes. Thus while the Arizona tax, in the words of the Supreme Court "could" disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner, the Washington tax *definitely* does so. The ramifications of this case, then, are nationwide and as broad and important as Indian commerce itself.

This case is appealed pursuant to 28 U.S.C. §1257(2) from the highest court of the State of Washington, the Washington Supreme Court. Article IV, Sections 1, 2, 3, 4, Constitution of the State of Washington. The appeal is taken from the Washington Supreme Court's Remittitur, which constitutes the final judgment of the Washington Supreme Court, and which became effective as of its date of entry, January 2, 1968. It is not subject to further

[1] *United States Indian Population and Land*, 1962, U.S. Dep't of Interior, Bureau of Indian Affairs.

correction or review since it stems from a decision en banc. Revised Code of Washington §2.04.170 states in pertinent part:

> "... and every decision of the court en banc shall be final except in cases in which no previous decision has been rendered in one of the departments, and in such cases the decision of the court en banc shall become final thirty days after its filing, unless during such period a petition for rehearing be filed, ... Whenever a decision shall become final as herein provided, a judgment shall issue thereon."

The decision of the Washington Supreme Court affirmed the decision of the Superior Court of Washington in and for Thurston County. Both courts sustained the validity of imposition of the Washington Cigarette Tax against the contention of the Makah Indian Tribe that it violated Article I, Section 8, Clause 3 of the Constitution of the United States and 25 U.S.C. §261. Both courts based their opinions solely upon federal grounds (Appendices A and B). The raising of the federal question was timely and it was so presented as to qualify for an appeal pursuant to 28 U.S.C. §1257(2). *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928).

CONCLUSION

This appeal raises the important federal question whether federal pre-emption of Indian commerce can be avoided by the states through indirection. The question is substantial and for proper resolution and plenary consideration requires briefs on the merits and oral argument. Determination of this matter is necessary to maintain the comprehensive federal scheme of regulation of Indian commerce and ultimately to protect Indians against prices deemed unfair and unreasonable by the Indian Commissioner.

Respectfully submitted,

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